IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 13.11.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

AND

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

CRL.A.No.226/2017

Senthil @ Arumugam .. Appellant / Sole Accused

Versus

State rep by
The Inspector of Police
All Women Police Station
Bhavani, Erode District.

[Crime No.11/2015] .. Respondent / Complainant

Appeal filed under section 376[2] Cr.P.C., against the Judgment passed in Special SC.No.7/2016 on the file of the Court of the District and Sessions Judge, Mahila Court [Magalir FTC], at Erode dated 30.09.2016.

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For Appellant : Mr.Philip Ravindran Jesudoss

For Respondent : Mr.R.Ravichandran, GA [Crl.Side]

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JUDGMENT

[Judgment of the Court was delivered by M.SATHYANARAYANAN, J.]

The appellant is the sole accused in SPL.CC. No.7/2016 on the file of the Court Mahila Fast Track Court, Erode. The appellant / accused stood charged, tried and convicted for the commission of offences under Section 366 IPC ; Section 9 of Child Marriage Prohibition Act, 2006 and Section 4 of the Protection of Children from Sexual Offences Act, 2012. [POSCO Act].

2 The Trial Court, vide impugned Judgment dated 30.09.2016, has convicted the appellant / accused as follows : -

Conviction under section	***Sentence Awarded***
366 IPC	To undergo 10 years rigorous imprisonment and to pay a fine of Rs.5000/- and in default, to undergo 2 years simple imprisonment.
4 of the POSCO Act, 2012	To undergo rigorous imprisonment for life and to pay a fine of Rs.5000/- and in default, to undergo 3 years simple imprisonment.

The Trial Court has acquitted the appellant / accused for the commission of the offence u/s.9 of the Child Marriage Prohibition Act,

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2006. The Trial Court further ordered the sentences to run concurrently and also granted set-off u/s.428 Cr.P.C. The accused / appellant challenging the legality of the conviction and sentence awarded by the trial Court vide impugned judgment, has filed this Criminal Appeal.

3 The facts leading to the filing of this appeal, necessary for the disposal of this criminal appeal, are as follows:-

3.1 The victim girl, at the time of the commission of the offence, was aged about 15 years and 2 months and therefore, this Court would indicate the victim as "Miss.H".

3.2 P.W.1-Tmt.Parvathy, is the mother of the victim – "Miss.H". The victim "Miss.H" was staying with her parents and a resident of Oricherry Village and she was studying 11th standard in a Government Vinobha High School at Thalavaipettai. The appellant/accused was also a resident of the very same village. According to the mother of the victim / P.W.1, the victim "H", at about 2.15 p.m. on 11.10.2015 [Sunday] told her that she is going to her

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friend's house, viz., Kalyani, which is about half a kilometre away from her residence and she did not return back for more than 1 hour and P.W.1 made a search and she also enquired with Kalyani and however, Kalyani told P.W.1 that victim did not come to her house. On 12.10.2015, at about 2.15 p.m., her daughter, viz., the victim girl, returned with a Mangalsutra tied on her neck and when P.W.1 enquired, she told her that the appellant/accused induced her to marry him and therefore, took her from Oricherry Village Bus Stop to Bhavani and from there, they proceeded to Salem and from Salem, they went to a Perumal Temple near Law College in a share auto and on the way, on the way, the appellant/accused tied her the Mangalsutra in an Amman Temple and thereafter, on the Verandah of the said temple, he had physical relationship with her and they stayed overnight in the said place and on the next day, they proceeded from Salem to Erode and from the Bus Stand, the appellant/accused sent her to Oricherry village by boarding her in Route No.51 bus and she returned.

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3.3 P.W.1 proceeded to the All Women Police Station, Bhavani, and lodged a complaint under Ex.P.1. P.W.12, who was the Special Sub Inspector of Police attached to the said Police Station, on

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receipt of the complaint under Ex.P.1 from P.W.1, has registered a case in Cr.No.11/2015 for the offence u/s.366 IPC and u/s.6 of the Protection of Children from Sexual Offences Act, 2012, at about 19.45 hours on 12.10.2015. Printed FIR is marked as Ex.P.17. P.W.12 forwarded the original complaint [Ex.P.1] and the Printed FIR [Ex.P.17] to the jurisdictional Magistrate Court.

3.4 P.W.13-Tmt.Rubi, was the Special Inspector of Police attached to the said Police Station at the relevant point of time. On receipt of the complaint under Ex.P.1 and FIR under Ex.P.17, took up the investigation and proceeded to Oricherry Bus Stop and in the presence of one Mani and Chinnasamy [P.W.4], prepared the Observation Mahazar and the Rough Sketch, which are marked as Exs.P.3 and 18 respectively. P.W.13 examined P.W.1, the victim girl "H" - P.W.2, P.W.3 and recorded their statements u/s.161[3] Cr.P.C. P.W.13, on 12.10.2015, through the Head Constable Eswari, referred the victim girl "H" to the Government Headquarters Hospital at Erode for medical examination.

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3.5 P.W.15-Dr.Kokilavani, the Assistant Surgeon attached to the Government Headquarters Hospital, at Erode, had examined the victim girl / P.W.2 and noted the following features:-

> *"O/E Patient conscious, oriented, PR-80/min. CVS-SIS2 present, RS-NVBS present. P/A-Soft, No external injuries over the body. Axillary hair, Breast development and pubic hair development normal for that age. L/E. External genitalia-Abrasion of 1/5x0.5cm present in the middle part of groove between labia majora and minora. Right side hymen ruptured. Vaginal introitus easily admits 1 finger.*
>
> *Vaginal smear and pubic hair taken and handed over to WGRI PC 475.*
>
> *Attained monarche at 14 years, irregular cycle once in 30-40 days. LMP-12.09.2015.*
>
> *Advice-UPT. USG abdomen and Pelvis."*

The Preliminary opinion is marked as Ex.P.24 and P.W.15 gave the final opinion under Ex.P.25, wherein she has opined that *"as per the final history, clinical examination and Laboratory Report, I am of the final opinion that Miss.H 16 yrs/F, D/o.Kathirvel have positive evidence for sexual intercourse prior to my examination."*

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3.6 P.W.13, the Investigating Officer continued to make search to nab the appellant/accused and on 13.10.2015, at about 09.30 a.m., made the arrest of the appellant/accused near the bus stop in front of the Government Hospital, Bhavani. The appellant/accused in the presence of P.W.5 and one Ramasamy, voluntarily came forward to give a confession statement and it was recorded and his signature was also obtained. The appellant/accused, through the Male Constables Senthilkumar and Sebastian, was referred for medical examination through a Memo to the Government Hospital, Erode.

3.7 P.W.8-Dr.Saravanakumar, was the Assistant Surgeon attached to the Government Headquarters Hospital, Erode, at the relevant point of time and he had examined the appellant/accused at about 2.40 p.m. on 13.10.2015 and noted the following features in the Accident Register, marked as Ex.P.9:-

"NATURE OF INJURY AND TREATMENT: [STATE SIMPLE, GRIEVOUS OR OPINION RESERVED]:-

1.எதிரி ஆண்மை தன்மை உடையவரா?

ஆண் குறி மற்றும் விதைப்பையில் விதைக்கொட்டைகள் வளர்ந்த ஆணுக்குறிய அளவில் உள்ளன. ஆண்மை தன்மை இல்லாதவர் என்று கூற இயலாது.

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2.உடலுறவு கொள்ள எதிரி தகுதியானவரா?

உடலுறவு கொள்ள தகுதியில்லாதவர் என்று கூற இயலாது.

3.எதிரியின் ஆண் உறுப்பில் காயங்கள் ஏதேனும் உள்ளதா?

ஆண்குறி தோலின் நுனிப் பகுதியில் சற்று கிழிந்த காயம் உள்ளது. காயம் சிவந்து ஆறாத நிலையில் உள்ளது,

4.எதிரி சமீபமாக உடலுறவு கொண்டதற்கான தடயங்கள் ஏதேனும் உள்ளதா?

ஆண்குறி தோலின் நுனிப் பகுதியில் சற்று கிழிந்த காயம் உள்ளது. காயம் சிவந்து ஆறாத நிலையில் உள்ளது,

5,எதிரிக்கு 1. Seminal fluid 2.பிறப்புறுப்பின் முடி சேகரம் செய்யவும் விந்து மற்றும் பிறப்புறுப்பின் முடி சேகரம் செய்யப்பட்டுள்ளது,"

He gave the final opinion that "*it cannot be said that the appellant/accused is not fit for intercourse* " and it was marked as Ex.P.10.

3.8 P.W.13 proceeded to the scene of crime / occurrence and on the Verandah of the Amman Temple, at 15.00 hours on 13.10.2015, in the presence of P.W.6 and another, prepared the Observation Mahazar and the Rough Sketch [Exs.P4 and 19] respectively. Thereafter, P.W.12 altered the sections to one of Section 366 IPC ; section 6 of the Protection of Children from Sexual Offences

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Act, 2012 and section 9 of the Child Marriage Prohibition Act, 2006 and the Alteration Report is marked as Ex.P.20 and forwarded the same to the jurisdictional Court.

3.9 P.W.13 on 14.10.2015, made a requisition to the Chief Judicial Magistrate, Erode, to record the statement of the victim girl "H" u/s.164 Cr.P.C., and it was marked as Ex.P.21. P.W.13, once again examined the victim girl / prosecutrix on 15.10.2015 and recorded her further statement and on 26.10.2015, sent the material objects pertain to the victim girl for biological examination and made a requisition under Ex.P.22. P.W.13, on 20.10.2015, had examined P.W.12 and other police officials and recorded their statements and also examined P.W.10-Dr.Priya, P.W.15-Dr.Kokilavani, P.W.8-Dr.Saravanakumar and P.W.9-Dr.Sivakumar and recorded their statements u/s.161[3] Cr.P.C. On 27.11.2015, P.W.13 examined Mr.Venkateshwaran, Scientific Officer attached to the Forensic Lab, Coimbatore. On 11.12.2015, P.W.13 went to the School in which the victim girl studied and made a requisition to the Headmaster to get her the Transfer Certificate and other particulars and also recorded his statement. On the next day, i.e., on 12.12.2015, a request to obtain

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the Birth Certificate of the victim girl from the Commissioner of Erode Municipality and also recorded his statement. On 19.12.2015, P.W.13 examined the junior Scientific Officer of Forensic Lab, Chennai and recorded his statement and on that basis, got the final opinion from P.W.8 with regard to the appellant/accused and on receipt of the final opinion from the Forensic Lab at Chennai, he got the final opinion from P.W.15.

3.10 P.W. 13, after completion of the investigation, has filed the charge sheet / final report before the Mahila Fast Track Court, Erode, who took it on file in Spl.CC No.7/2016 and issued summons to the accused and on his appearance, had framed charges u/s.366 IPC u/s.9 of the Child Marriage Prohibition Act, 2006 and u/s.6 of the Protection of Children from Sexual Offences Act, 2012 and questioned the appellant/accused and he pleaded not guilty of the charges levelled against him.

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3.11 The prosecution, in order to sustain their case, examined P.Ws.1 to 15 and marked Exs.P.1 to 24 as well as M.O.1 series [X-Rays].

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3.12 The appellant/accused was questioned under section 313[1][b] Cr.P.C., with regard to the incriminating circumstances made out against him in the evidences rendered by the prosecution and he denied it as false. The appellant/accused did not file any documents nor let in any oral evidence.

3.13 The Trial Court, on consideration and appreciation of the oral and documentary evidences and other materials, has convicted and sentenced the appellant/accused as stated above and hence, this appeal.

4 Mr.Philip Ravindran Jesudoss, learned counsel for the appellant/accused had made the following submissions:-

[a] The testimonies of P.W.1 – mother of the victim girl as well as the victim girl, who was examined as P.W.2 would clearly disclose that the victim girl / P.W.2, voluntarily accompanied the appellant/accused and without any coercion or compulsion, she married the appellant/accused and

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accepting the Mangalsutra tied by the appellant/accused was also a voluntary one and so also the act of physical relationship subsequent to the said act.

[b] It is also the admission on the part of P.Ws.1 and 2 that after the said acts, it was only the appellant/accused who made P.W.2 to board the bus to reach her native place and therefore, there was no *mens rea* on the part of the appellant/accused to commit any offence.

[c] The medical report of the victim girl / P.W.2 as well as the final opinion given by P.W.15-Dr.Kokilavani, under Ex.P.25 would disclose that the act of physical relationship was a voluntary one and therefore, the ingredients of the offences have not at all been made out.

[d] The testimony of P.W.7 coupled

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with Ex.P.7 would also sustain the defence of the appellant/accused that there was no evidence of forceful physical relationship and would contend that in any event, the Trial Court ought to have granted benefit of doubt and acquitted the appellant/accused.

5 Alternately, it is pleaded by the appellant/accused that in the light of the voluntary nature of the acts done by the appellant/accused as well as the victim girl, the sentence of imprisonment of life awarded to the appellant/accused may be modified and prays for appropriate orders.

6 *Per contra,* Mr.R.Ravichandran, learned Government Advocate [Crl.Side] would vehemently contend that admittedly, the appellant/accused was aged about 26 years at the time of the commission of the offence and he was also a married person and he knows pretty well the consequences of his grave act and enticing a minor girl aged about 15 years and odd with a false promise to marry, had a forceful physical relationship with her and as such, the

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ingredients of the offences for which he had been charged, was proved beyond any reasonable doubt by the prosecution. It is the further submission of the learned Government Advocate [Crl.Side], by drawing the attention of this Court to section 4 of POSCO Act, 2012 as well as to section 30 of the said Act, that there is a presumption drawn against the culpable mental state of mind on the part of the appellant/accused and the appellant has failed to discharge the said burden cast upon him u/s.30 of the POSCO Act. It is also contended by the learned Government Advocate that it is enough to convict the appellant/accused with the testimony of the victim for the offence under POSCO Act, and the said testimony had inspired the confidence and the Trial Court has taken note of the same and on a thorough consideration of the oral and documentary evidences, had rightly reached to convict the appellant/accused for the commission of the offences u/s.366 IPC and u/s.4 of the POSCO Act and imposed the maximum sentence of imprisonment for life and submitted that in the light of the facts and circumstances and this Court, in exercise of its Appellate jurisdiction, may not interfere with the same.

6.1 The learned Government Advocate [Crl.Side], in

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support of his contentions, has placed reliance upon the decisions reported in ***2015 [7] SCC 359 [Satish Kumar Jayanti Lal Dabgar V. State of Gujarat]*** and ***2017 [2] SCC 51 [State of Himachal Pradesh V. Sanjay Kumar @ Sunny]***.

7 This Court paid its anxious consideration to the rival submissions made and also perused the oral and documentary evidences and other materials placed on record as well as the original records and the impugned Judgment.

8 The following questions arise for consideration:-

[a] Whether the prosecution is able to prove the ingredients of the offences for which the appellant/accused has been charged?

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[b] Whether the judgment of the Trial Court in convicting and sentencing the appellant/accused for the commission of the offences u/s.366 IPC and 4 of the Protection of Children from Sexual Offences Act, 2012, is sustainable?

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Question NO.1:-

9 P.W.1 is the mother of the victim girl / P.W.2 and her examination in chief is in consonance with her complaint under Ex.P.1. P.W.1, in her cross-examination, would depose that she knew the accused for about six months and prior to the occurrence, she do not know him and only when her daughter – P.W.2 / victim girl "H" told about the occurrence, she knew the appellant/accused. P.W.1 would further depose that the appellant has already got married and residing along with his wife. P.W.1 would also depose that her daughter/victim girl had told her that she is going to her friend's house and sometime thereafter, she did not return and a search was made and till her return on the next day, they did not lodge the complaint and on 12.10.2015, P.W.1 had lodged the complaint and it was written by the former President of Oricherry village, viz., Mr.Thangamani, who has also accompanied her at the time of lodging the complaint and in the Police Station, they handed over the Mangalsutra and மெட்டி [toe ring] and an acknowledgment was also obtained. P.W.1 has denied the suggestion that only with the consent of her husband, she had agreed with her

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daughter's marriage with the appellant/accused and on account of the difference of opinion with her husband, she has lodged the complaint against the appellant/accused.

10 P.W.2 is the victim girl "H" and the Trial Court, after ascertaining the mental capability of P.W.2 to give evidence, has recorded her statement by putting questions in the light of the Judgment of All the prosecution witnesses were examined as per the dictum laid down by this Court reported in ***2015 [1] L.W. [Crl] 55 [S.Yuvaraj Vs. State of Tamil Nadu]***. P.W.2 in her chief examination would depose that she was staying with her parents and on 11.10.20135 at about 1.30 p.m. [Sunday] after visiting her aunt's house, she was coming back to her house and in Oricherry Bus stop, the appellant was standing in front of the house of one Ishwarya and he told her that he wants to talk to her ; but she did not stop and immediately, the appellant/accused told her that he will commit suicide and thereafter, asked to her come with him to marry him. Then, P.W.2 told him that she does not want to leave her parents and once again, the appellant told her that he will commit suicide and she was perplexed and thereafter, the appellant/accused took her to Bhavani in

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a bus and from there, he took her to Salem in bus and from there, he took a share auto and alighted near the Law College and took her through Yercaud road and it was about 7.30 p.m. or 8.00 p.m. P.W.2 would further depose that the appellant took her to the Perumal Temple and on the way, he took her to Amman Temple and in that place, he removed the black thread from his hand and tied on her neck and thereafter, on the Verandah of the temple, had physical relationship and after staying back overnight, when they came down on the next day at 6.00 a.m. on 12.10.2015, a lady questioned them as to from where they are coming and also asked about the whereabouts of the appellant told her that he married the victim girl / P.W.2 and thereafter, she provided them food and on the way to the Bus stop, the appellant purchased the toe ring as well as the Mangalsutra and while proceeding from Salem to Erode, in the bus, he tied the Mangalsutra and after alighting at Erode, the appellant/accused boarded her in Route NO.51 to Oricherry village. The statement recorded from P.W.2 u/s.164 Cr.P.C. is marked as Ex.P.2.

11 A perusal of the cross-examination of P.W.2 / victim girl "H" would reveal that she went voluntarily with the

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appellant/accused and insofar as the physical relationship is concerned, she would depose that she resisted and when a specific question was put to her as to whether she made any attempt to escape and whether she asked for any help of somebody, she answered that it cannot be done. A specific question was also put to her as to whether she made any attempt to run away after the act of physical relationship, she answered that she made an attempt ; but the appellant/accused did not permit her to go. P.W.2 would further depose that on the next day at 6.00 a.m., both of them were coming down, she had never made any attempt to inform anybody as to the forceful physical relationship on the part of the appellant/accused with her, till she boarded the bus at Salem and insofar as tying of Mangalsutra in the bus is concerned, she stated that none of the passengers had seen it. The said witness would further depose that she boarded the bus from Erode to Oricherry in Route No.51 and though she knew the Conductor of the bus, she did not disclose the said fact. Thus, a careful analysis of the testimony of P.W.2 would clearly would reveal that she went with the appellant/accused voluntarily.

12 The appellant/accused, after arrest, was subjected to

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medical examination and P.W.8-the doctor who examined him, has recorded in the Accident Register – Ex.P.9 that it cannot be said that he is incapable of having sexual intercourse and he has also sustained injury on his private part and it is yet to be healed. But, he did not notice the presence of any foreign hair/pubic hair. Likewise, the victim girl / P.W.2 was also subjected to the Radiological Assessment and as per the report of the Radiologist under Ex.P.11, it was observed that "*the bone age of the above mentioned person [victim girl] is likely to be aged about 15 years and below 17 years based on the findings observed in the bones were radiographed.*" The victim girl was also referred to the Gynecologist for further evaluation and she was examined by P.W.15-Dr.Kokilavani and she, after recording that the right side hymen ruptured ; vaginal introitus easily admits 1 finger under Ex.P.24, has given her final opinion under Ex.P.25, wherein she has observed that *"the victim girl has positive evidence for sexual intercourse prior to examination."*

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13 In the decision reported in ***2015 [7] SCC 359 [Satish Kumar Jayanti Lal Dabgar V. State of Gujarat]***, the scope of sections 375 and 376 IPC came up for consideration and the said

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case pertains to rape of a minor below 16 years. The Hon'ble Apex Court in paragraphs No.14 to 18, has observed as follows:-

> ***14*** First thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375 of the IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:
>
> "**375. Rape**-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-
>
> ***Sixthly*** - With or without her consent, when she is under sixteen years of age.
> ***Explanation***.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."
>
> ***15*** The Legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

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16 Once we put the things in right perspective in the manner stated above, we have to treat it a case where the appellant has committed rape of a minor girl which is regarded as heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind Protection of Children from Sexual Offences Act.

17 The purpose and justification behind sentencing is not only retribution, incapacitation, rehabilitation but deterrence as well. Certain aspects of sentencing were discussed by this Court in Narinder Singh v. State of Punjab, (2014) 6 SCC 466. It would be apt to reproduce the said discussion at this juncture:

> ***14*** The law prohibits certain acts and/or conduct and treats them as offences. Any person committing those acts is subject to penal consequences which may be of various kinds. Mostly, punishment provided for committing offences is either imprisonment or monetary fine or both. Imprisonment can be rigorous or simple in nature. Why are those persons who commit offences subjected to such penal consequences? There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.
>
> ***15*** Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well, namely, whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation, etc. In the absence

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of such guidelines in India, the courts go by their own perception about the philosophy behind the prescription of certain specified penal consequences for particular nature of crime. For some deterrence and/or vengeance becomes more important whereas another Judge may be more influenced by rehabilitation or restoration as the goal of sentencing. Sometimes, it would be a combination of both which would weigh in the mind of the court in awarding a particular sentence. However, that may be question of quantum.

16 What follows from the discussion behind the purpose of sentencing is that if a particular crime is to be treated as crime against the society and/or heinous crime, then the deterrence theory as a rationale for punishing the offender becomes more relevant, to be applied in such cases. Therefore, in respect of such offences which are treated against the society, it becomes the duty of the State to punish the offender. Thus, even when there is a settlement between the offender and the victim, their will would not prevail as in such cases the matter is in public domain. Society demands that the individual offender should be punished in order to deter other effectively as it amounts to greatest good of the greatest number of persons in a society. It is in this context that we have to understand the scheme/philosophy behind Section 307 of the Code.

17 We would like to expand this principle in some more detail. We find, in practice and in reality, after recording the conviction and while awarding the sentence/punishment the court is generally governed by any or all or combination of the aforesaid factors. Sometimes, it is the deterrence theory which prevails in the minds of the court, particularly in those cases where the crimes committed are heinous in nature or depict depravity, or lack morality. At times it is to satisfy the element of "emotion" in law and retribution/vengeance becomes the guiding

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factor. In any case, it cannot be denied that the purpose of punishment by law is deterrence, constrained by considerations of justice. What, then, is the role of mercy, forgiveness and compassion in law? These are by no means comfortable questions and even the answers may not be comforting. There may be certain cases which are too obvious, namely, cases involving heinous crime with element of criminality against the society and not parties inter se. In such cases, the deterrence as purpose of punishment becomes paramount and even if the victim or his relatives have shown the virtue and gentility, agreeing to forgive the culprit, compassion of that private party would not move the court in accepting the same as larger and more important public policy of showing the iron hand of law to the wrongdoers, to reduce the commission of such offences, is more important. Cases of murder, rape, or other sexual offences, etc. would clearly fall in this category. After all, justice requires long-term vision. On the other hand, there may be offences falling in the category where "correctional" objective of criminal law would have to be given more weightage in contrast with "deterrence" philosophy. Punishment, whatever else may be, must be fair and conducive to good rather than further evil. If in a particular case the court is of the opinion that the settlement between the parties would lead to more good; better relations between them; would prevent further occurrence of such encounters between the parties, it may hold settlement to be on a better pedestal. It is a delicate balance between the two conflicting interests which is to be achieved by the court after examining all these parameters and then deciding as to which course of action it should take in a particular case.

18 Likewise, this Court made following observations regarding sentencing in the cases involved in sexual offences in the case of Sumer Singh v. Surajbhan Singh and others, (2014) 7 SCC 323.

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33 It is seemly to state here that though the question of sentence is a matter of discretion, yet the said discretion cannot be used by a court of law in a fanciful and whimsical manner. Very strong reasons on consideration of the relevant factors have to form the fulcrum for lenient use of the said discretion. It is because the ringing of poignant and inimitable expression, in a way, the warning of Benjamin N. Cardozo in The Nature of the Judicial Process - Yale University Press, 1921 Edn., page 114.

> "The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in social life'."

34 In this regard, we may usefully quote a passage from Ramji Dayawala and Sons (P.) Ltd. v. Invest Import, (1981) 1 SCC 80:

> "20. ...when it is said that a matter is within the discretion of the court it is to be exercised according to well established judicial principles, according to reason and fair play, and not according to whim and caprice. 'Discretion', said Lord Mansfield in R. v. Wilkes, (1770) 4 Burr 2527, 'when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and

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regular'" (see Craies on Statute Law, 6th Edn., p.273).

35 ***In Aero Traders Pvt. Ltd. v. Ravinder Kumar Suri***, (2004) 8 SCC 307, the Court observed:

> "6. ...According to Black's Law Dictionary 'Judicial discretion' means the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right. The word 'discretion' connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. (See 27 Corpus Juris Secundum, page 289). When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice and not according to private opinion; according to law and not humour. It only gives certain latitude or liberty accorded by statute or rules, to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him."

Thus, the judges are to constantly remind themselves that the use of discretion has to be guided by law, and what is fair under the obtaining circumstances.

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36 Having discussed about the discretion, presently we shall advert to the duty of the court in the exercise of power while imposing sentence for an offence. It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the court's accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society. Therefore, striking the balance we are disposed to think that the cause of justice would be best subserved if the respondent is sentenced to undergo rigorous imprisonment for two years apart from

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the fine that has been imposed by the learned trial judge."

14 In the decision reported in ***2017 [2] SCC 51 [State of Himachal Pradesh V. Sanjay Kumar @ Sunny],*** the case pertains to rape of a child/minor and the evidenciary value of the testimony of the victim came up for consideration and it is relevant to extract paragraph No.31:-

After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured

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witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance {See Bhupinder Sharma v. State of Himachal Pradesh[4]}. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

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15 In the decision reported in ***2012 [7] SCC 171 [Narender Kumar Vs. State [NCT of Delhi]]***, the Hon'ble Supreme Court, in paragraphs No.20 and 21, has observed as follows:-

"...

20 *It is a settled legal proposition that once the statement of the prosecutrix inspires the*

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confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground fro throwing out an otherwise reliable prosecution case.

21 *A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness, a matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial [sic circumstantial], which may lend assurance to her testimony. [vide* ***Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. And Vishnu Vs. State of Maharastra].”***

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16 In ***Mohd.Ali alias Guddu V. State of Uttar Pradesh*** reported in ***2015 [7] SCC 272,*** the conviction based on the sole testimony of prosecutrix, came up for consideration and it is relevant to extract paragraph No.30:-

"...

30 *True, it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is no unreproachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely does not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the appellant – accused for the alleged offences and the High Court has fallen into error, without reappreciating the material on record, by giving the stamp of approval to the same."*

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Similar view has been taken in the judgment reported in ***2013 [4] SCC 200 [State of Haryana V. Basti Ram].***

17 The ratio laid down in the above cited decisions is to the effect that the statement of the prosecutrix if found to be worth of credence and reliable, it requires no corroboration and the Court may convict the accused on the sole testimony of the prosecutrix.

18 The appellant/accused is also charged for the commission of the offence u/s.4 of the Protection of Children from Sexual Offences Act, 2012.

19 Section 2[f] of the said Act defines *"penetrative sexual assault"* and as per the said definition, it has the same meaning as assigned to it under section 3. It is relevant to extract section 3 and 4 of the said Act:-

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> *"'**3.Penetrative Sexual Assualt:-** A person is said to commit "penetrative sexual assault" if -*
>
> ***[a]** he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child*

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or makes the child to do so with him or any other person ; or

[b] *he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person ; or*

[c] *he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other persons ; or*

[d] *he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.*

4.Punishment for penetratrive sexual assault:- *Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."*

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20 Section 2[d] defines "child" which means any person below the age of eighteen years. Section 30 of the Act speaks about presumption of culpable mental state and it is relevant to extract the same:-

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30.Presumption of culpable mental state:-

[1] *In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

[2] *For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.*

Explanation *– In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."*

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21 As per the Radiology Report marked as Ex.P.11, it was opined that the bone age of the victim is likely to be about 15 years and below 17 years. The prosecution has also marked Ex.P.15-Entry as per the School records and it would also disclose that the victim girl was born on 20.08.2000 and the school in which the victim had undergone studies, has also issued the Transfer Certificate and as

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per the same, the victim girl was born on 20.08.2000. Therefore, the prosecution was able to prove that the victim girl was aged about 15 years and odd at the time of commission of the offence on 11.10.2015. As per section 3 of the POSCO Act, 2012, if any person commits penetrative assault, on the child who is below the age of 18 years, he is liable to be punished u/s.4 of the act, which prescribes imprisonment of either descriptive for a term which shall not be less than 7 years ; but which may extend to imprisonment for life and shall also be liable to fine. Section 30 of the Act draws presumption of culpable state of mind and sub-section [2] of section 30 of the Act states that for the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities. The explanation to the said section says that the culpable mental state includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

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22 The appellant/accused is already married and he knows the consequences of marrying a minor and having physical relationship. No doubt, the evidence made available would disclose

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that the victim girl voluntarily went with the appellant/accused and as per Ex.P.24 signed by P.W.15-Dr.Kokilavani, at the time when the victim girl was brought before her for medical examination, she made a statement to that effect that the appellant/accused told her that he is going to marry her and therefore, she went with him on 11.10.2015 and on the night hours on that day, had a physical relationship with her. In the light of the stringent provisions of the POSCO Act, 2012, even if the act of physical relationship is a consensual one, still it would amount to penetrative sexual assault as defined u/s.3 of the POSCO Act, 2012, and as a consequence, the appellant/accused is liable to be punished u/s.4 of the Act, and also in the light of the fact that the ingredients of section 366 IPC have also been made out, apart from section 3 of the POSCO Act, 2012. Therefore, the Trial Court was right in convicting the appellant/accused for the commission of the offence u/s.366 IPC and section 4 of the POSCO Act, 2012.

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23 The evidence let in by the prosecution would also satisfy the ingredients of the offence u/s.366 IPC for the reason that the victim who was a minor girl, was induced to come with him for the purpose of marrying the appellant/accused on the ground that the

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appellant/accused threatened to commit suicide and therefore, she went with him and thereafter, the facts leading to the commission of the offence u/s.4 of the Protection of Children from Sexual Offences Act, 2012, had taken place and the Trial Court has rightly appreciated the evidence let in, in that regard and convicted and sentenced the appellant/accused for the commission of the offence u/s.366 IPC. This Court finds no infirmity in the said findings and hence, the conviction and sentence imposed for the offence u/s.366 IPC is also confirmed.

QUESTION No.2:-

24 This Court has also considered the alternate plea made by the learned counsel for the appellant who has pointed out certain portions of the cross-examination of P.W.2 and as already pointed out in the earlier paragraphs, P.W.2 voluntarily went with the appellant/accused who made a promise to marry her and on the date of the alleged marriage, he had physical relationship with her also. The victim girl, till her return to the place of residence, she was in the company of the appellant/accused and though she travelled in a public transport and had very many opportunities to disclose about the

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forceful physical assault, she did not utter anything to anybody and in fact, the appellant/accused made her to board the bus to go to her native place. It is also pleaded by the learned counsel for the appellant/accused that the appellant/accused is a married man and he has repented for having committed the said offence without knowing the consequences and in the even of the sentence of life imprisonment awarded to him is confirmed, his family would definitely be put to untold hardship and mental agony, apart from suffering due to loss of reputation.

25 Mr.R.Ravichandran, learned Government Advocate [Crl.side] would submit that the appellant/accused being a married man, had the knowledge about the consequences of doing such a heinous crime and the Trial Court has taken note of the facts and circumstances and has rightly awarded the maximum punishment.

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26 After hearing the rival submissions, this Court is of the view that the evidence placed before this Court would clearly indicate that the victim girl / prosecutrix going with the appellant/accused was a voluntary act and the conduct of the

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appellant/accused in sending back the victim girl to her native place on the very next day, is also can be taken as a mitigating circumstance to reduce the period of imprisonment awarded by the Trial Court and the appellant/accused at the time of the conviction was aged about 26 years and he is having a chance to repent and redeem himself.

27 In the result, the Criminal Appeal is dismissed and the **conviction and sentence** imposed on the appellant/accused for the commission of the offence **u/s.366 IPC** are hereby **confirmed** and the **conviction** for the commission of the offence **u/s.4 of Prevention of Children from Sexual Offences Act, 2012**, is also **confirmed** ; however, the **sentence** awarded, is **modified** and the appellant/accused is directed to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5000/- and in default, to undergo 3 years simple imprisonment and the sentences are ordered to run concurrently. The period of sentence already undergone by the appellant/accused is ordered to be given set-off under section 428 Cr.P.C.

[MSNJ] [NSSJ]
14.11.2017

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To

1.The Sessions Judge,
Mahila Court, Fast Track Court, Erode.

2.The Principal District and Sessions Judge,
Erode.

3.The Superintendent,
Central Prison, Coimbatore.

4.The Inspector of Police
All Women Police Station
Bhavani, Erode District.

5.The Director General of Police
Mylapore, Chennai-4.

6.The District Collector,
Erode District.

7.The Public Prosecutor
High Court, Madras.

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M.SATHYANARAYANAN, J.,

AND

N.SESHASAYEE, J.,

AP

HIGH COURT OF JUDICATURE MADRAS
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Crl.A.No.226/2017

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